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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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**COMMISSIONERS**

TOM FORESE, CHAIR  
DOUG LITTLE  
BOYD DUNN  
BOB BURNS  
ANDY TOBIN

IN THE MATTER OF THE APPLICATION  
OF  
**ARIZONA PUBLIC SERVICE COMPANY**  
FOR A HEARING TO DETERMINE THE  
FAIR VALUE OF THE UTILITY PROPERTY  
OF THE COMPANY FOR RATEMAKING  
PURPOSES, TO FIX A JUST AND  
REASONABLE RATE OF RETURN  
THEREON, [AND] TO APPROVE RATE  
**SCHEDULES** DESIGNED TO DEVELOP  
SUCH RETURN.

IN THE MATTER OF FUEL AND  
PURCHASED POWER PROCUREMENT  
AUDITS FOR ARIZONA PUBLIC SERVICE  
COMPANY.

(Teena Jibilian, Hearing Officer)

**DOCKET NO. E-01345A-16-0036**

**GAYER'S  
MOTION TO SUSPEND PROCEEDINGS  
RE: THE 90-DAY FAIR NOTICE ISSUE**  
**Oral Argument Requested**  
**Expedited Processing Requested**

**DOCKET NO. E-01345A-16-0123**

Richard Gayer, an Intervenor herein, hereby moves to suspend proceedings herein until the issue of Fair Notice to new customers regarding the fairness of the notice to them of post 90-day options is resolved. The suspension will commence immediately after testimony is concluded, and no brief shall be filed, no Recommended Opinion and Order ("ROO") shall be prepared, no ROO shall be filed, and the Commission shall issue no Order in this case until an agreement is reached among the parties or Judge Jibilian issues an Order that gives new customers fair notice of the rate options available to them after the conclusion of the 90-day waiting period during which they are required to remain on a time-sensitive rate. Fair notice means a written notice, including a bill insert, that informs new customers of the foregoing options sufficiently before the end of the foregoing 90-day period to allow them a meaningful opportunity to choose from among all the rates that will be available to them after the 90-day

1 period so that the chosen rate shall apply to a customer's bill immediately upon the conclusion  
2 of the 90-day period.

3 If no such agreement is reached or no such Order is issued by Judge Jibilian after a  
4 reasonable effort has been made to do so, then the parties shall be granted ten business days to  
5 file papers in the Superior Court of Maricopa County seeking a restraining order and other  
6 remedies to obtain the fair notice described above. The foregoing grant means that the  
7 suspension of proceedings will remain in place during the granted ten day period and that the  
8 granted period shall begin when Judge Jibilian decides that spending further time and effort  
9 would not be likely to produce the fair notice procedure sought by the Intervenor(s) then  
10 pursuing that notice.

## 11 ARGUMENT

### 12 **I. APS's Proposed Treatment of New Customers Violates Their Due Process Rights**

13 Basic due process requires that "new customers" (as defined in the Settlement Agreement  
14 or elsewhere) receive adequate notice of their options that begin after the requisite 90-days on a  
15 time based rate, such as Time-of-Use or TOU with a demand charge. Such notice must be  
16 received by new customers sufficiently before the 90-days expire, as stated above.

17 The issuance of a Decision by the Arizona Corporation Commission ("A.C.C.") or even the  
18 issuance by an Administrative Law Judge of a ROO would violate the due process guarantees of  
19 the Constitutions of both the United States and Arizona regarding fair notice. Opinions from the  
20 United States Supreme Court on this issue are legion, but a few cases will suffice here. *Jones v.*  
21 *Flowers*, 547 U.S. 220 at 226 (2006) observes that "we have stated that due process requires the  
22 government to provide 'notice reasonably calculated, under all the circumstances, to apprise  
23 interested parties of the pendency of the action and afford them an opportunity to present their  
24 objections.' *Mullane*, 339 U. S., at 314. Notice is "constitutionally sufficient if it was  
25 reasonably calculated to reach the intended recipient when sent." *Id.*, at 226. Finally, "[t]he  
26 means employed must be such as one desirous of actually informing the absentee might  
27 reasonably adopt to accomplish it, 339 U. S., at 315" (internal quotes omitted). *Id.*, at 229.

1        *In re Gault*, 387 U.S. 1, 33 (1967) states that “[n]otice, to comply with due process  
2 requirements, must be given sufficiently in advance of scheduled court proceedings so that  
3 reasonable opportunity to prepare will be afforded [.]” “Due process of law requires notice of  
4 the sort we have described -- that is, notice which would be deemed constitutionally adequate in  
5 a civil or criminal proceeding.” *Ibid*.

6        For a complete discussion of the foregoing principles, please see the excerpt from  
7 *Mullane v. Central Hanover Bank*, 339 U.S. 360 at 315-316 (1950) that follows the Conclusion.

8        Due process principles also apply to APS because it is a regulated public utility under the  
9 laws of the State of Arizona; that is, APS is a quasi- governmental entity. Note also that any  
10 approval by the Arizona Corporation Commission of an APS policy that violates its customers’  
11 due process rights, whether expressed in a Commission’s Decision or done *sub silencio*,  
12 constitutes a constitutional due process violation.

## 13    **II. APS’s Proposed Treatment of New Customers Constitutes Unlawful Discrimination.**

14        A.R.S. section 40-334 on discrimination by public utilities also applies to APS: “(A) A  
15 public service corporation shall not, as to rates, charges, service, facilities or in any other  
16 respect, make or grant any preference or advantage to any person or subject any person to any  
17 prejudice or disadvantage. (B) No public service corporation shall establish or maintain any  
18 unreasonable difference as to rates, charges, service, facilities or in any other respect, either  
19 between localities or between classes of service.”

20        Preliminarily, it appears that the proposed rates for new customers that impose 90-days  
21 on a time based rate violates both subdivisions (A) and (B) of section 40-334. First, the  
22 proposed rates do subject “any person [any new customer] to any prejudice or disadvantage”,  
23 since the forced time based rate is certainly a disadvantage. Second, the forced time based rates  
24 do “maintain an unreasonable difference between as to rates ... or *in any other respect* between  
25 classes of service” emp. add), where the class here is “new customers”.

26        If the proposed rates at issue here are not *per se* violations of section 40-334, then a lack  
27 of adequate notice regarding the additional options available to new customers after the  
28

1 expiration of the 90-day period certainly does violate subdivision (A) as to "any prejudice or  
2 disadvantage".

3 Judicial decisions on 40-334 are few, and published decisions thereon are even fewer.  
4 However, *Trico Electric Cooperative v. Senner* (member, A.C.C.), 92 Ariz. 373 (Ariz. 1962)  
5 and *Marco Crane and Rigging v. A.C.C.*, 155 Ariz. 292 (Ariz. App. 1987) are helpful.

6 In *Trico* at page 386, the Supreme Court, after citing Article 15, Section 12 of the  
7 Arizona Constitution and A.R.S. section 40-334, stated that "[a] public service corporation is  
8 impressed with the obligation of furnishing its service to each patron at the same price it makes  
9 to every other patron for the same or substantially the same or similar service. It must be equal  
10 in its dealings with all. It must treat the members of the general public alike." (Internal quotes  
11 omitted.) Accord, *Marco Crane* at page 297: "A public service corporation must treat all  
12 similarly situated customers alike. It cannot extend a privilege to one and refuse the same  
13 privilege to another." The same applies to the disadvantages to which APS proposes to subject  
14 its new customers, even those who have been long-term customers at a different address.

### 15 **III. APS's Proposed Treatment of New Customers Constitutes Consumer Fraud.**

16 Failure by APS to provide such notice would constitute a form of Consumer Fraud under  
17 Arizona Revised Statutes ("ARS") sections 44-1521, et seq. The Arizona Consumer Fraud Act,  
18 A.R.S. section 44-1522 (A) provides that "The act, use or employment by any person of any  
19 deception, deceptive act or practice, fraud, false pretense, false promise, misrepresentation, or  
20 concealment, suppression or omission of any material fact with intent that others rely upon such  
21 concealment, suppression or omission, in connection with the sale or advertisement of any  
22 merchandise whether or not any person has in fact been misled, deceived or damaged thereby, is  
23 declared to be an unlawful practice. There is no need to prove actual misleading, deception or  
24 damage. Note carefully that "concealment, suppression or *omission* of any material fact" [emp.  
25 added] are included as forms of fraud.

26 Compare the simplicity of this law with the additional elements of common law fraud.  
27 "Actionable fraud requires a concurrence of all nine elements of fraud. *Nielson v. Flashberg*,  
28 101 Ariz. 335, 419 P.2d 514 (1966). The requisite elements are: (1) A representation; (2) its



1 falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5)  
2 his intent that it should be acted upon by and in the manner reasonably contemplated; (6) the  
3 hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; and (9)  
4 his consequent and proximate injury.” *Schmidt v. Mel Clayton Ford*, 124 Ariz. 65, 67 (Ariz.  
5 App. 1979). Most significantly is the addition of actual reliance and proximately caused injury.

6 “The Consumer Fraud Act provides an injured consumer with an implied private cause of  
7 action against a violator of the act. *Sellinger v. Freeway Mobile Home Sales, Inc.*, 110 Ariz. 573,  
8 521 P.2d 1119 (1974). The elements of a private cause of action under the act are a false  
9 promise or misrepresentation made in connection with the sale or advertisement of merchandise  
10 [or services, 44-1521(5)] and the hearer's consequent and proximate injury. *Parks v. Macro-*  
11 *Dynamics*, 121 Ariz. 517, 591 P.2d 1005 (App.1979). We find the record contains sufficient  
12 evidence as to each of these elements to sustain the jury's verdict on both punitive and  
13 compensatory damages.” *Dunlap v. Jimmy GMC of Tucson, Inc.*, 36 Ariz. 338, 342 (App. 1983).


#### 14 CONCLUSION

15 Intervenor Gayer has shown that the proposed treatment by APS of its “new customers”  
16 violates the Due Process Clause, A.R.S. § 44-1522 on discrimination and § 40-334 on Consumer  
17 Fraud. Indeed, it constitutes *per se* violations of § 44-1522. Consider also the plight of a “new”  
18 APS customer, including one who has recently moved from an apartment to a single family  
19 dwelling. He or she is no more likely to be aware of options after the 90-day period than any  
20 other “new” customer. Therefore, the ALG should suspend these proceedings immediately at  
21 the conclusion of testimony and perform the acts requested herein so that the rights of new  
22 customers may be preserved. Otherwise, they will be irreparably injured.

23 Intervenor Gayer supports the pending Motion of Commissioner Robert Burns for a stay  
24 before this case reaches Commissioners Forese and Little. The preparation or filing of a ROO  
25 before the issues presented by Gayer and Commissioner Burns are decided may result in a  
26 Decision that is both temporary and without substantial meaning.

1 Dated: 30 April 2017

Respectfully submitted by,



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6 **Mullane v. Central Hanover Bank, 339 U.S. 306, 313-315 (1950)**

7 Personal service of written notice within the jurisdiction is the classic form of notice  
8 always adequate in any type of proceeding. But the vital interest of the State in bringing any  
9 issues as to its fiduciaries to a final settlement can be served only if interests or claims of  
10 individuals who are outside of the State can somehow be determined. A construction of the Due  
11 Process Clause which [339 US page 314] would place impossible or impractical obstacles in the  
12 way could not be justified.

13 Against this interest of the State we must balance the individual interest sought to be  
14 protected by the Fourteenth Amendment. This is defined by our holding that "The fundamental  
15 requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385,  
16 394. This right to be heard has little reality or worth unless one is informed that the matter is  
17 pending and can choose for himself whether to appear or default, acquiesce or contest.

18 The Court has not committed itself to any formula achieving a balance between these  
19 interests in a particular proceeding or determining when constructive notice may be utilized or  
20 what test it must meet. Personal service has not in all circumstances been regarded as  
21 indispensable to the process due to residents, and it has more often been held unnecessary as to  
22 nonresidents. We disturb none of the established rules on these subjects. No decision constitutes  
23 a controlling or even a very illuminating precedent for the case before us. But a few general  
24 principles stand out in the books.

25 An elementary and fundamental requirement of due process in any proceeding which is  
26 to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise  
27 interested parties of the pendency of the action and afford them an opportunity to present their  
28 objections. [citations] The notice must be of such nature as reasonably to convey the required

1 information [citations], and it must afford a reasonable time for those interested to make their  
2 appearance [citations]. But if with due regard for the practicalities and peculiarities of the case  
3 these conditions [ 339 U.S. Page 315] are reasonably met, the constitutional requirements are  
4 satisfied. "The criterion is not the possibility of conceivable injury but the just and reasonable  
5 character of the requirements, having reference to the subject with which the statute deals."  
6 [citations] But when notice is a person's due, process which is a mere gesture is not due process.  
7 The means employed must be such as one desirous of actually informing the absentee might  
8 reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of  
9 any chosen method may be defended on the ground that it is in itself reasonably certain to  
10 inform those affected [citations], or, where conditions do not reasonably permit such notice, that  
11 the form chosen is not substantially less likely to bring home notice than other of the feasible  
12 and customary substitutes.

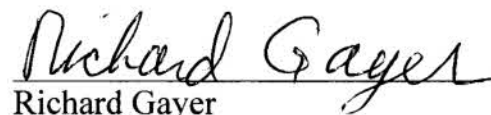
13 It would be idle to pretend that publication alone, as prescribed here, is a reliable means  
14 of acquainting interested parties of the fact that their rights are before the courts. It is not an  
15 accident that the greater number of cases reaching this Court on the question of adequacy of  
16 notice have been concerned with actions founded on process constructively served through local  
17 newspapers. Chance alone brings to the attention of even a local resident an advertisement in  
18 small type inserted in the back pages of a newspaper, and if he makes his home outside the area  
19 of the newspaper's normal circulation the odds that the information will never reach him are  
20 large indeed. The chance of actual notice is further reduced when, as here, the notice required  
21 does not even name those whose attention it is supposed to attract, and does not inform  
22 acquaintances who might call it to attention. In weighing its sufficiency on the basis of  
23 equivalence with actual notice, we are unable to regard this as more than a feint.

24 \*\*\*\*\*

#### 25 CERTIFICATE OF SERVICE

26 On 30 April 2017, I served copies of this document on all parties to this case.

27 Dated: 30 April 2017

28   
Richard Gayer